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THE BLACK POPULATION IN THE BRAZILIAN LEGAL SYSTEM - A RELATIONSHIP OF LAW AND RACISM THAT PERPETUTES TODAY - FROM THE COLONY, FROM THE EMPIRE TO THE QUOTA LAW

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Abstract: The study of slavery in the legal field gains manifest relevance, as it deals with a subject of paramount importance for us to understand the legal history of Brazil with regard to the construction of new paradigms for the black people. The field of law and justice has become the object of historical investigation, in the strong sense of the term, LARA, 2000, p.11. With regard to the legal framework for the enslavement of Africans and their descendants in Brazil, silence is practically complete. On some occasions, however, interest in compiling and publishing legal orders relating to African slaves in Brazil has manifested itself. (LARA, p.7). Our objective is to provide the steps for one to have knowledge and understanding from the perspective of the law of the various legal devices, which were formed over the centuries around slavery and which served to support the idea of inferiority of the black population, through legal concepts in force in Colonial Brazil and Imperial Brazil. To deal with this article, we will hover over the works of André Barreto Campelo, entitled, Legal Manual of Slavery: Empire of Brazil; History, Law and Slavery - The Slave Legislation in the Old Ibero-American Regime of; Slavery in Brazil, historical-legal-social essay Agostinho Marques Perdigão Malheiros, in a fruitful and in-depth research of other relevant bibliographies, where part of these works were reproduced here with legal information pertinent to the development of this work. Studying law in the colonial period and the empire of Brazil until today arouses interest in knowing the perspectives of Brazilian society, in building a diverse and plural nation, deconstructing Eurocentrism.

Keywords: Black Population, Law, Legislation

INTRODUCTION

We begin our introduction by quoting the words spoken by Perdigão Malheiro s, 1886,

which are still alive today:

> Since man is reduced to the condition of a thing, subject to the power and dominion or property of another, he is considered dead, deprived of all rights, and has no representation whatsoever, as Roman law had already decided. He cannot, therefore, claim political rights, rights of the city, in the phrase of the People King; nor hold public office: which is expressly enshrined in various ancient laws of the country, and is still part of our current law, as incontestable principles, although they recognize that this is one of the great evils resulting from slavery.
>
> ...
>
> Such is the extent of this incapacity that, among us, slaves are not even admitted to serve as enlisted men in the army and navy. Nor to exercise Ecclesiastical offices, whether of a mixed nature, such as parish priest and others, or of a purely spiritual nature; as far as Canon Law and Civil Law are concerned. (MALHEIRO, P. 11)

The marks of slavery did not disappear from Brazilian society and many legal resources will be necessary for this ideal to be realized, these marks were spread in Brazil for centuries, leaving enormous scars and to try to overcome this existing debt to Afro-descendants, the law of quotas as a palliative measure in universities and public services.

With the study of legal norms, we seek to see everyday life and understand how a society protects its main values and how it intends to defend and implement the guaranteed and crystallized rights.

Law cannot be understood as an isolated phenomenon in time and space, it must not be seen as a heap of norms that are not related to values, visions of the world and social groups.

Slavery was not just a force relationship, but a legitimate social phenomenon, as it was supported by the legal system in force in the 19th century. And several times, it is seen only as a factual phenomenon, perceived under sociological or economic nuances, which simply existed in Brazil until the 19th century and which was extinguished by means of Law nº 3.353, of May 13, 1888.

However, the issue is not as simple as that: the slave system was supported by legislation, which even constitutionalized it, despite not referring to it directly (MORAES, 1966, p.372, apud Campelli).

According to Chignoli 2019, colonial legislation in Brazil regulating slavery was erratic in the Philippine Ordinances. In addition to this document, there are other additions to the Ordinances and laws that dealt with this subject during the colonial period.

In this sense, it is important to emphasize that the enslaved was a good, a property, an object of law, but, at the same time, he was a subject of law to suffer the sanctions of the criminal law listed in Book V of the Ordinances.

Therefore, Portuguese America inherited a legal institute legacy from Portugal that confused the classification of object and subject of law, according to the legal branch in which the rule was framed: in Private Law, the enslaved was, mostly, the object of right; in Public Law, he was a subject of law.

This issue is still perpetuated when we are faced with structural racism and the high prison rate, among several other social inequalities.

DEVELOPMENT

HISTORICAL GENESIS

Slavery developed in the Iberian colonies, although not unambiguous, carried characteristic features, especially in the logic that permeated its reproduction. The legal experience related to captivity was a crucial element in the conformation of the slave regime established in the New World by

Portuguese and Castilian people.

The enslavement of Africans and their descendants, as practiced by Portuguese traders and settlers in Brazil, was a procedure considered licit, valid, legitimate and fair in the face of divine laws, natural law and the law of nations.

The statement, which seems so shocking today, did not cause astonishment during the first centuries of Portuguese domination in America. Essentially slave-oriented, Portuguese metropolitan legislation was mainly concerned with the practical aspects of control.

Hence, it is worth reinforcing the relevance of the specific study of the laws for understanding the process of implantation and recreation of the practice of slavery in the Ibero-American universe.

For Lara, 2000:

> Dispersed in collections or compilations printed in the 18th and 19th centuries, Portuguese colonial legislation, as a whole, is already a source of difficult access. The criteria for selecting the texts are almost never made explicit, the indexes leave much to be desired and gaps are frequent. As for the legal documents referring to slavery, the difficulty is even greater: the theme almost never appears in the spotlight and the researcher has to unfold over several volumes until he manages to locate a specific determination. Turning to handwritten documentation, the difficulties seem to grow geometrically. There are several collections that contain Portuguese legal production and, even if we focus on the two main institutions responsible for guarding the orders and determinations of the Crown and Overseas Council, respectively the National Archive of Torre do Tombo and the Overseas Historical Archive, we do not exhaust the question. (LARA, p. 8).

The assumption of a legislative tradition about slavery particular to the Iberian states is not new in historiography.

On the other hand, Silva Junior states in his work that a specific code for black slavery in Portuguese America was never created and successive Castilian attempts in this direction undertaken in the second half of the 18th century were unsuccessful.

However, it is certain that there was a legal tradition concerning the enslavement of Africans and their descendants, both for Brazil and for the "Indies of Castile".

Despite the notable specificities existing between the current legal diplomas, relative to Spain and Portugal, the historically intertwined way in which their gestation process took place, the sharing of certain basic assumptions and the analogous logic that permeated their operation are elements that allow speak in an Iberian legal tradition about African-American slavery.

In fact, for the author, more important than the continuity of the practice of slavery would have been the survival of a long legal tradition about slavery, inherited from the Code of Justiniano and condensed in the famous compilation of King D. Afonso the Wise, the Siete Partidas, organized between the years 1263 and 1265.

This "code", forged within Christian doctrine and based on the principle that slavery was contrary to natural law, would recognize the humanity of the captives, guaranteeing them minimum conditions of existence and access to freedom through manumission.

The building of the Iberian Atlantic system would take place from the combination of elements of the Luso-Castilian historical experience:

The Reconquista process and its insertion in the Mediterranean commercial circuit. As is known, the formation of both kingdoms as sovereign national monarchies took place between the 11th and 15th centuries amid the confrontation of the common Moorish enemy and internal struggles.

The retaking of Muslim-dominated

territories would make it possible for the Portuguese and Castilians to enter the Mediterranean-oriented trade network, but, on the other hand, it would not put an end to their rivalries. The political and economic disputes between the two Christian kingdoms would soon spread overseas.

With the technical and financial support of merchants of other nationalities - Genoese, above all, Castile and Portugal would leave in the 15th century to explore the so-called "Atlantic Mediterranean" and the coastal region of the African continent, with a view to promoting the assortment of the luxury market. of European urban centers.

At the end of the century, it was possible to notice a strong cleavage in the direction taken by those overseas ventures. As a result of a series of treaties signed between the 1470s and 1490s.

The Spaniards would dedicate themselves to the conquest and occupation of the Canary Islands and, in a second moment, the Caribbean insulas, while the Lusitanians would explore the other Atlantic islands and the coast of Africa, monopolizing the slave trade from the outset.

The search for metals was present from the beginning, which took place firstly through barter with Africans and then through the exploration of gold veins in the Caribbean islands.

The setting up of sugar mills in the Atlantic archipelagos, combined with the construction of commercial factories along the West African coast, would sediment the elementary production complex transplanted to regions where it was not possible to extract gold and silver.

After a first stage of settlement in the Caribbean region, the Castilians launched the movement to conquer continental America (1519-1640), achieving the discovery of substantial deposits of precious metals.

In regions such as Santo Domingo and Puerto Rico, dedicated to the manufacture of sugar, enslaved Africans were present from the very beginning of the occupation.

In the following moment, the captive blacks would also be employed in the extraction of gold and in the performance of domestic tasks, in addition to practicing various activities in urban regions and where the decline of the indigenous population made them necessary (Berbel, Marquese & Parron, 2010, pp. 35-36).

After the "period of trading posts" (1502-1534), Portugal, the other side of the coin, began the process of colonizing southern America in order to guarantee dominion over the region (Johnson, 1997, pp.241-281). Thus, Brazil would be included in the framework of Portuguese imperial policy.

As a mineral wealth equivalent to that of the Spanish territories was not immediately found, the alternative was to reproduce the sugar model previously experimented in Madeira and São Tomé, in particular, taking advantage of the favorable climate and soil conditions.

The difficulties encountered in employing indigenous labor and the propagated advantages of using African captives paved the way for the transatlantic trade towards the great sugar hubs that would soon be established in northeastern Brazil.

In the first decades of the 17th century, black slaves became predominant in the sugar industry, while in the peripheral regions the exploitation of the captivity of the "blacks of the land" would follow (Perrone-Moisés, 1992, pp. 115-132; Monteiro, 1994; Zeron, 1998).

It is necessary to point out that both the Portuguese and Castilian legislative order were marked by continuities and discontinuities in relation to European statutes or measures published in the past. Norms were issued to solve problems that arose, to obtain greater income for the Crown, to preserve order and

so on.

On several occasions, provisions were released that innovated or even contradicted the content of the original texts.

Realizing that the objective of their publication had not been achieved or that they could cause disturbances to the constituted order, the central power did not hesitate to derogate them, ratifying once again the content of the old legal devices, embodied, more directly, in the *Siete Partidas* and in the *Ordinances of the Kingdom.*

Indeed, in a constant movement of luxury and luxury, *Departures and Ordinances* would consecrate themselves as perennial legal pillars, to which one could always return in case of failure to enact regulations that went beyond their content or even to fill the gaps left by the new legislation.

In the author's words:

> The idyllic vision of Luso-Brazilian slavery was constructed largely from the reports of travelers who traveled through Brazil during the 19th century, such as Auguste de Saint-Hilaire, Henry Koster, João Maurício Rugendas, George Gardner, John Luccock, among others. others. In these texts, the treatment given to slaves in Brazil was often characterized as not very strict, and even quite benevolent.
>
> Such narratives would spread abroad, still in the 19th century, the supposed Brazilian "racial paradise", serving as a basis, already at that time, for formulations that sought to emphasize the North American "racial hell".
>
> ...
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> By contrasting their society with the Brazilian one, those men sought to highlight the singular severity of southern slaveholders and the strong racism already perceptible at that time (Azevedo, 2003, pp.147-198). Furthermore, in the Cortes of Lisbon (1821-22) and in the National Constituent Assembly of Rio de Janeiro (1823), Brazilian deputies used similar arguments to defend the continuity of slavery in Brazil (Berbel, Marquese & Parron, 2010, pp.95-181). (SILVA, p.37)

LEGAL GENESIS

Portugal's political independence from the kingdom of León, in the twelfth century, did not correspond to immediate legal autonomy; Castilian legislation exerted a direct influence on the formation of the Portuguese normative system, with the Siete Partidas being one of the elementary sources for the formulation of its first compilation of a broader normative nature, the ``Ordenações Afonsinas``, dating from the 15th century (Caetano, 1981; Costa, 1996, apud Silva).

There was a clear tension in the general legal conception of the Old Regime period between respect for the canonical-Roman founding texts and the need for innovation, for updating tradition in order to make it compatible with the extratextual environment, that is, the society in which texts must be applied (Hespanha, 2005, p.113, apud Silva)

The constitution of Indian law – a term consecrated by Hispanic historiography to describe the legal order operating in the territories of America and Oceania that belonged to the Spanish Universal Monarchy, commonly called the Indies – and of what could be called Luso-Brazilian colonial law led to this same tow voltage.

It is evident that the context inaugurated by overseas expansion was followed by progressive adjustments and legal rearrangements, both on the Portuguese and Castilian sides.

However, the development of the normative framework related to slavery, which was effective in Iberian America, far preceded the colonial enterprise, having accompanied the very process of political formation in those countries, being inserted, from the beginning, in their legislative-doctrinal repertoire.

The elementary aspect to be observed is that

> the legal system related to Hispanic slavery emanated from medieval Romanist-based legal sources fundamentally shaped in the Fuero Juzgo and the Siete Partidas, which served as a subsidiary right until the end of the colonial period (Lucena Salmoral, 2000, pp.07-25).

Although the Matches have found greater irradiation on American regulatory frameworks.

The Fuero Juzgo, also known as the Visigothic Code, Liber Iudiciorum, Liber iudicum, forum iudicum, Lex Visigothorum recesvindina, among other names, is a compilation of laws passed by Visigothic kings that was approved at the VIII Council of Toledo, held in the year 654. during the reign of Rescenvindo (649-672).

The legal provisions that compose it are grouped in twelve books, according to a thematic orientation, and bring the note antiqua or antiqua noviter amendment, as well as the mention of the monarch who dictated them.

This is a more complete expression of the so-called leges barbarorum, in which the ancient customary law of Germanic descent (Volksrecht) began to receive the influx of principles extracted from the Roman law in force when the Western Roman Empire fell (Azevedo, 2007, pp.92-98).

What has come down to us, was its vulgate form, a revised edition that underwent certain changes related to what could be called "public law" and the duties of monarchs, with the addition of regulations of the Egica kings (687-702) and Vitiza (702-710), other extravagant laws, and certain doctrinal additions.

This "code" would find applicability in various parts of the Iberian Peninsula in the course of the Middle Ages, having been preserved by the Mozarabs in their communities in the interior of Muslim cities and in the Christian territories from which the Reconquista movement started.

CODE BLACK CREATED IN THE AGE OF THE ENLIGHTENMENT

If we are going to cite this work in the legal historiography of the black population, we cannot hide the existence of the Black Code, written in France in 1685 and rewritten in 1724 in Louisiana.

In the words of **Doudou Dièn**e, in an interview with Vatican Radio, this code conveys the feelings of disgust, horror and affliction that slavery and the slave trade transmit to him.

> One of the most significant articles of this Code, in which slaves are declared "mobile". Indeed, the Black Code, a document unknown to a large part of humanity, is nothing more than a set of laws issued in 1685 by the King of France, Louis XIV, to regulate slavery and maintain the discipline of the Roman Catholic Church in the territories that were, at the time, under French rule.
>
> ...
>
> some pertinent texts, related to the Slave Trade, among which the curse of Ham that remind us that it is in the Sacred Scripture that the slave traffickers were inspired; texts that the author wanted, with this publication, to remove from the oblivion to which Universal History has condemned everything related to slavery.

In Carelli's explanation, 2020, the Black Code, or Code Noir, was a legal document edited by King Louis XIV, for the first time in 1685, with the alleged intention of regulating the work of enslaved blacks in the French colonies, in America and bringing them some guarantees.

What was seen, however, alongside the granting of some measly rights never materialized to blacks, was a list of restrictions on workers and, more than that, the maintenance and legitimation of the servile condition, the cause of all the evils that

supposedly intended to mitigate.

The norm was so perfidious that it even affected the Jews, who were expelled from French territories by this instrument. The Black Code is one of the most criticized legal instruments of all time, with Voltaire stating that "the Black Code only serves to show that the jurists consulted by Louis XIV have no idea what human rights are". (CARELLI, 2020)

The Code granted the following rights to enslaved blacks: weekly rest on Sundays, professing the Catholic religion and going to mass, the master's obligation to provide enslaved people aged ten or more with two and a half pots of cassava flour and three pounds of two and a half pounds of cassava, plus two pounds of salted beef or three pounds of fish (half of this to the enslaved children); prohibition of replacing this food with cachaça; supply of two pieces of cloth clothing or four measures of cloth, at your choice.

There was also a provision that if the enslaved were not fed, dressed and treated according to the Code, they could reach the attorney general, who would prosecute the slave owner for "barbaric and inhuman crimes and treatment by the masters in relation to their slaves" (article 26).

On the other hand, the Black Code, in addition to legitimizing slavery, prohibited those enslaved from selling, under any circumstances, products derived from sugar cane and the sale of other products was only allowed with the express authorization of their master.

It was also foreseen that the enslaved could not own any material goods, and the acquisition by any means, even if by a gift from third parties, would automatically enter the master's patrimony.

If enslaved people could not be parties in civil justice (article 31), they were capable of being defendants in criminal justice (article 32). The enslaved could be punished with chains or whips by the masters, "when they believed that the slaves deserved it", but they could not be mutilated or suffer torture (article 42).

Article 45: said that the regulation did not want to deprive the subjects (that is, the masters) of the ability to stipulate rules specific to their staff, as is done with their possessions in money or other movable things like enslaved people.

PHILIPPINES ORDINATIONS:

The Philippine Ordinances resulted from the reform made by Felipe II of Spain (Felipe I of Portugal), to the Manueline Code, during the period of the Iberian Union. It continued to operate in Portugal at the end of the Union, as confirmed by D. João IV.

Until the promulgation of the first Brazilian Civil Code, in 1916, they were also in force in Brazil.

Colonial legislation in Brazil regulating slavery was erratic in the Philippine Ordinances. In addition to this document, there are other additions to the Ordinances and laws that dealt with this subject during the colonial period.

In this sense, it is important to emphasize that the slave was a good, a property, an object of law, but, at the same time, he was a subject of law to suffer the sanctions of the criminal law listed in Book V of the Ordinances.

Therefore, Portuguese America inherited a legal institute legacy from Portugal that confused the classification of object and subject of law, according to the legal branch in which the rule was framed: in Private Law, the enslaved was, mostly, the object of right; in Public Law, he was a subject of law.

Prior to Book V, the Ordinances were very clear on what the slave could not do, to avoid any doubt that he would be a subject of law. This way, Title 9 of Book III, which dealt with those who could not be cited because of their

jobs, people, places or for some other reason, adduced that the arrested or imprisoned in a public jail by the authority of Justice could not be cited. In this sense, the enslaved, even imprisoned, and, in this context, considered a subject of law to be detained, could not be detained in the process, as it is impossible to be cited. The enslaved person, moreover, could not be a witness, nor be asked about any legal fact, except when there was an express legal provision. Again, there was a figure with a lot of legal hybridity, insofar as the enslaved person could be a witness, even if he was the object of law, if the law allowed it. However, the legislation did not say what guarantees or rights this person would have as a witness. Furthermore, the Ordinances dealt with the white Christian slave, who could be a witness to a crime in which he was a participant (Ord. Philippines, Book III, Title 56).

The Philippine Ordinances, of 1603, were in force in Brazil until the elaboration of the Civil Code of 1916, emerged as a legislative diploma closer to the reality of the New World and the mercantilist explorations of the natural riches of the colonies. The word "servant" appears replaced by "slave" in relation to Africans only.

In this legal diploma, the norms on slavery were arranged in books IV and V, being respectively questions about civil law and criminal law and criminal procedure.

Of the legislative structures of the Brazilian legal system, in force in the Empire of Brazil, one cannot fail to mention that the country not only inherited the economic and social structure in force during the colony, but also the Portuguese metropolitan legislation, approved by the Law of October 20 from 1823:

> Art1.º The Ordinances, Laws, Regiments, Avaras, Decrees, and Resolutions promulgated by the Kings of Portugal, and by which Brazil was governed until the 25th of April 1821, when His Most Faithful Majesty, current King of Portugal, and Algarves, was absent from this Court; and all those that were enacted from that date onwards by Mister D. Pedro de Alcântara, as Regent of Brazil, in what reign, and as Constitutional Emperor of it, since it was erected as an Empire, remain in full force in the part in which they are not have been revoked, for them to regulate the affairs of the interior of this Empire, until a new Code is organized, or they are not specially altered.
>
> ....

Counselor Joaquim Ribas thus comments and criticizes the application of the Philippine Ordinances to Brazilian society (RIBAS, 1982, p. 76):

> The last [Portuguese legislative work], which is still in force today, was begun in the reign of Fellippe II of Spain and I of Portugal, and concluded in the following, being sanctioned and published by Alv. From the 11th of January 1603. As a result, however, of the elevation of the house of Bragança to the throne of Portugal, it was deemed necessary to revalidate these Ordinances, and for this purpose D. João IV issued the law of the 29th of January 1643, which revoked all legislation prior to it, [with some exceptions] (...). Of the five books of Philippine Ordinances, almost only the 4th is devoted to the theory of civil law. But its precepts, in addition to being grossly deficient, and formulated without order, are not up to date with the needs of today's society and the progress of legal science.

Notwithstanding these criticisms, civil legal transactions in general, as well as contracts, must be regulated by this legislative diploma, which also presented the rules for governing the contract for the purchase and sale of slaves, under the terms of Title XVII, Book IV, of the Philippine Ordinances:

> Any person who buys a slave sick with such an illness, who prevents him from making use of him, may refer him to the person who sold him to him, proving that he was already sick in his power with such an illness, provided that he mentions it to the

> seller within six months. the day the slave is delivered to him.
>
> It must be noted that, in the paragraphs of Title XVII, Book IV, of the Philippine Ordinances, there was the regulation, as well as any redibitory vices, in addition to others that could contaminate the aforementioned legal transaction:
>
> If the slave has committed any crime, for which, being proven, he deserves the death penalty, and he is still not free by sentence, and the seller at the time of the sale does not declare, the buyer may engeital him within six months, counted in the manner mentioned above. And the same will be the case if the slave had tried to kill himself out of boredom for life, and the seller, knowing this, had not declared it.

In short, in the legal transaction of buying and selling itself, it can already be seen that sanctions could be applied to enslaved people, in view of the peculiar legal regime of captives, different from that related to free men.

IMPERIAL CONSTITUTION OF 1824

Thus, in the words of Campelli:

Slavery was not expressly foreseen in any of the devices of the Imperial Constitution of 1824, which could not be different, since, due to its liberal inspiration, such Charta Magna could not explicitly betray its own purpose, as advocated by the constitutionalist theory, the protection of individual freedoms.

Dealing with slavery in a liberal Constitution would be a contraditio in terminis, however, the constituent legislator found a way out: implicitly, he made reference to freed Brazilian citizens, that is, who emerged from capitis diminutio maxima, starting to enjoy their *libertatis status*, but without achieving the same civitatis status as naive Brazilian citizens.

Article 6, §1, of the 1824 Constitution, which classified Brazilian citizens into two categories, the naïve and the freed:

> Article 6. Are Brazilian Citizens I. Those who were born in Brazil, whether they are naïve or freed, even if the father is a foreigner, as long as he does not reside in the service of his Nation.
>
> In order to perfectly define these legal terms contained in the Imperial Charta, it is very important to read the lessons of Counselor Joaquim Ribas (1982, p. 280, apud Campelli).

In relation to the right to freedom, men are divided into – free and slaves, and those are subdivided into – naive and freed. One who is born free is called naive; I free the one who, having been born a slave, achieved freedom.

It can be concluded that, if the imperial Magna Carta itself attributed the condition of citizens only to those individuals who presented themselves as naive or freed, it was because this diploma admitted, at least tacitly, the existence of, in the territory of the Empire (article 2º), there is the possibility of the existence of other individuals who could not be citizens, because they did not have this libertatis status, that is, because they were slaves.

The imperial Constitution did not declare the existence of slavery, but it could be inferred the existence and legitimacy of this institute, by the Brazilian legal system.

CRIMINAL CODE OF THE EMPIRE

The Criminal Code of the Empire of Brazil, the Law of December 16, 1830, established the concept of criminal, in its arts. 3rd and 4th:

> Article 3.º There will be no criminal, or delinquent, without bad faith, that is, without knowledge of evil, and intention to practice it.
>
> Article 4th Are criminals, as perpetrators, those who commit, constrain, or order someone to commit crimes.

Enslaved persons do not fall into any of the cases of unimputability provided for in article 10 of the said Criminal Code:

> Article 10. Nor will they be considered criminals:
>
> 1. Children under fourteen years of age.
>
> 2. The insane of all kinds, unless they have lucid intervals, and in them they commit the crime.
>
> 3. Those who commit crimes violated by force, or by irresistible fear.
>
> 4. Those who casually commit crimes in the exercise or practice of any lawful act, done with ordinary intent.

Therefore, obviously, the enslaved, despite their capitis dimininutio maxima, were subject to the Penal Code, being able to appear as "criminals" of the behaviors foreseen in this legal diploma: In general, the criminal law considers the slave as a person, when it judges fit to serve agent or patient of any crime (RIBAS, 1982, p. 282, apud Campelli).

Another issue that deserves analysis is the possibility that the enslaved person would become a victim of the crime of homicide committed by his master: legally speaking, the dominus that perpetrated conduct that would result in the death of the slave could be prosecuted for the offense provided for in the arts. 192 or 193 of the Criminal Code of the Empire or was he exercising his faculty, derived from his power of ownership over his servus?

To answer this question, it must be noted that article 14, item 6 of the Criminal Code of the Empire allowed the possibility for the dominus to practice harmful conduct that would result in damage to his slave, provided that in a moderate way, in the form of punishment, unless it violated the laws in force in the Empire: it treated It is a hypothesis of a "justifiable crime", according to the penal legislation of the time, but denunciations of the slave against the master would not be admitted, under the terms of article 75, § 2, of the 1932 Code of Criminal Procedure of the Empire, since "the will of the captive cannot collide with the will of his owner" (COSTA, 2009, p. 205).

It must be noted that, according to the Criminal Code of the Empire, the master could not kill the slave, as a private sanction for the acts committed by the latter. Moderate punishment does not include the death of the servus. (RIBAS, 1982, p.282)

By committing this offense, the State would be authorized to prosecute the master who had caused the death of his slave, due to the punishments applied.

In this sense, the complaint offered by the deputy prosecutor (article 74 of the Code of Criminal Procedure of the Empire: Law of November 29, 1832), before the Substitute Judge of the 3rd Criminal District of the Comarca of São Luís do Maranhão, against Doctor Anna Rosa Vianna Ribeiro, Baroness of Grajaú (wife of the president of the Province of Maranhão, Dr. Carlos Fernando Ribeiro, in 1884), for the murder of her slave Inocêncio, in the face of immoderate punishments perpetrated by her:

This way, the accused was named as the author of the abuse and mistreatment found and recognized on the corpse of her slave Inocêncio, since this one, during the time he was possessed by her, was never in another power and under other views, becomes the same accused, Mrs. Anna Rosa Vianna Ribeiro criminal; and, therefore, and in compliance with the law, the undersigned gives this complaint, in order to be punished with the penalties enacted in article 193 of the Criminal Code, offering as witnesses to those named below, who will be summoned to testify on the day and time that you designate, as well as the accused to be processed, under

penalty of default, making the necessary requests (ALMEIDA, 2005, p. 65-70).

It must be noted that the penalty of galleys, that is, provision of forced public work, with feet in chains, was inapplicable to women, under the terms of article 45, 1st, of the Criminal Code of the Empire, and its conversion into prison must occur, with the performance of services compatible with the female sex, for the same period of time fixed in the sentence.

In the case under discussion, a decision of dismissal was handed down (on 01.23.1877), pursuant to article 145 of the Code of Criminal Procedure of the Empire, which, being the object of an appeal, was reformed (on 12.13.1877), determining the judgment ad quem (Court of Appeal) the pronunciation of the defendant, which was taken to a popular jury, being acquitted on 22.02.1877.

After an appeal (article 301 of the Empire's Criminal Procedure Code), the appeal was dismissed (on 05.22.1877), and, there being no appeal to the Supreme Court of Justice (article 305 of the Empire's Criminal Procedure Code), the case became final.

ILLEGALITY OF SLAVERY IN BRAZIL:

Dealing with the illegality of slavery in Brazil dates back a long time, according to the author:

> Evaristo de Moraes, in a brilliant work, questions the legality of maintaining slavery and slaves, in light of the rules in force during the Empire of Brazil.
>
> The aforementioned author, to his astonishment, quotes an excerpt from the speech of Senator Ribeiro da Luz, in a speech given on July 7, 1883, reflecting on the validity and effectiveness of the Law of November 7, 1831 (discussed below):
>
> I don't know what law authorized slavery. What the homeland's history tells us is that, with Indian slaves among us, to free them, Africans were introduced, who began to replace them in captivity. I am aware of many laws, which make reference to slavery, and establish special provisions regarding the slave; but I know of none that expressly authorizes slavery in Brazil. It was time and then the laws, which referred to slavery, that legalized it. (MORAES, 1966, p. 156-157)
>
> The rule is freedom, since slavery is not presumed:
>
> Since slavery, as an abnormal fact contrary to natural law, is only tolerated by civil law, by virtue of purely economic reasons, it is never and under no circumstances presumed, but must, on the contrary, always be proven: Inst. Just. pr. from free. 1st and 5th; order I, 4th tit 42; target June 30, 1609. (MARQUES apud MOARES, 1966, p. 165)
>
> This conclusion stems from an exercise in logic: if the political Constitution, which must serve as a foundation for the defense of fundamental rights, does not declare (at least expressly) the existence of slavery, not tolerating the violation of the right to freedom (article 179, I and VII, of the Charter of 1824, for example), there would be no reason to tacitly infer that this abominable civil institute would prosper in our soil. Evidently, this was not how the Imperial *Charta* was interpreted.
>
> Proof of this is that the Supreme Court of Justice (whose existence and powers were provided for in article 163 of the Imperial Charter), ruled against this classic precept of Roman and canon law, understanding that freedom cannot be presumed if there is aggression against the right of ownership of the dominus over the slave. This decision is commented on by the jurist Cândido Mendes de Almeida:
>
> The causes of freedom by our ancient law will always be considered pious causes (...), and therefore enjoying all favor. However, a decision of the Supreme Court of July 5, 1832, published in ``Diário do Rio de Janeiro`` on August 23 of the same year, declared that, in

these cases, freedom could not be granted to slaves to the detriment of property rights, i. e., against the principle hereby signed. In view of what §4º says [of title 11, of Book 4, of the Philippine Ordinances] in principle all Roman and Canonical legislation in favor of the freedom of captives must be accepted and executed; nor would it be possible that in an age of liberty the legislation formerly executed with so much favor on behalf of the slaves, must become without any reason or law of loathsome hardness. (MENDES, 1870, p.790)

It must be noted that Roman and canon law were considered as sources of Brazilian civil law, depending on the application of the Philippine Ordinances (RIBAS, 1982, p.107), with subsidiary application, under the terms of Title LXIX, Book III, of Ordinances and under the limitations conferred by the law of good reason, the Law of August 18, 1769. (RIBAS, 1982, p.110)

However, in the Empire of Brazil, the foundations of its economy justified the existence of the factual situation of slavery (SENTO-SÉ, 2000, p.37-39), since, by the existing legal diplomas, the validity of the norms referring to its maintenance passed being increasingly questioned by society. An irreformable factual situation legitimized the validity of non-approved diplomas.

Still talking about illegality, we have:

Despite this debate about the legitimacy of slavery, a strong thesis began to emerge in imperial Brazil: slavery was an illegal conduct and that, in fact, the slave masters were carrying out a typical double conduct, smuggling (article 177 of the Criminal Code) and reduce a free person to slavery (article 179 of the Criminal Code).

The idea was simple, the Empire of Brazil signed an international treaty with the Kingdom of England, on November 26, 1826, through this instrument: "[…] Brazil prohibited trafficking within three non-extendable years. Those involved in them would then be punished as pirates. England was granted the much coveted right of visit and search" (TAUNAY, 1941, p. 264)

This treaty was ratified on March 13, 1827, and must come into effect from 1830 onwards. (VIANNA, 1967, p. 148)

By Ordinance of May 21, 1831, issued by the Minister of Justice Manoel José de Souza Franco, during the Regency, the smuggling of slaves was expressly prohibited:

Since the Government of His Majesty Imperial is informed that some traders, both national and foreign, speculate with dishonor to humanity the shameful smuggling of introducing slaves from the African Coast into the ports of Brazil, in spite of the extinction of such trade, orders the Provisional Regency, on behalf of of the Emperor, by the Secretary of State for Justice Affairs, that the City Council of this city issue a circular to all justices of the peace in the parishes of its territory, recommending all police surveillance in that regard; and that in the event that some new slaves are introduced by smuggling into the territory of each of the said parishes, they immediately proceed to the respective corpus delicti and confirming that such or such an idiot slave was introduced there by smuggling, kidnap him, and the submit the same corpus delicti to the criminal judge of the territory for him to proceed in accordance with the law, in order to have his freedom restored, and the usurpers of it punished, according to article 179 of the Code, reporting everything immediately to the same Secretariat. (MORAES, 1966, p. 366)

This ordinance had very little repercussion, in addition to being very low in effectiveness. It must be noted that the ordinances were considered sources of law that sought to regulate the cases dealt with therein, without harming third parties, or revoking or changing the current legislation (RIBAS, 1982, p.83 and MORAES, 1966, p.154), for this reason came the Law of November 7, 1831.

Article 1 of that diploma established: "All

slaves who enter the territory or ports of Brazil from outside are free.".

Of two alternatives, one of the theses must prevail: First, if one considers the argument that the eventual act of trafficking slaves from the African Coast is the importation of merchandise – understanding the slave as a commodity, in view of its possible res nature –, it can be seen that the importation of these is prohibited since March 13, 1827, therefore, the importer commits the public crime of smuggling:

Article 177. Import or export prohibited foodstuffs or goods; or not pay the duties that are allowed, on their import or export.

Penalties – loss of goods or goods, and a fine equal to half their value.

In the concrete case, the master who would import such slaves could appear, at least, as accomplices, in the form of article 6, 1, of the Criminal Code of the Empire:

Those who receive, hide or buy things obtained by criminal means, knowing that they were, or having to know it because of the quality or condition of the people, from whom they received or bought. (pages 143)

Second, however, it is clear that the legislator, by the Law of November 7, 1831, actually ensured that slaves introduced after the validity of this provision would be considered as free men.

In theory, there could no longer be slaves that had been imported into Brazil, as of the publication of this legal diploma. This is the only conclusion that can be reached.

Any individual who reduced these men to the condition of slaves would be committing the particular crime, against individual freedom, of reducing a free person to slavery (as provided for in article 4 of this aforementioned law):

Article 179. To reduce to slavery a free person, who finds himself in possession of his freedom.

Penalty – imprisonment for three to nine years, and a fine corresponding to a third of the time; however, the prison time will never be less than that of unjust captivity, and a third more.

Commenting on the theme, the brilliant Pernambuco deputy Joaquim Nabuco:

Indeed, the vast majority of these men, especially in the South, are either Africans, imported after 1831, or their descendants. Now, in 1831 the law of November 7 declared in its 1st article: "All slaves who enter the territory or ports of Brazil from outside are free.". As is known, this law was never put into effect, because the Brazilian government could not fight the traffickers; but that does not mean that it ceases to be the letter of freedom for all imports after its date. That before 1831, due to the ease of acquisition of Africans, the mortality of our slaves, whether from the Coast or Creoles, was enormous, is a well-known fact. "It is well known, Eusébio de Queirós said in 1852 in the Chamber of Deputies, that most of these unfortunates [imported slaves] are mowed down in their first years, due to the wretched state reduced by the mistreatment of the trip, by the change of climate, of food and all the habits that constitute life". Of these Africans, however, - almost all were captured in their youth - introduced before 1831, very few will remain today, that is, after fifty years of slavery in America added to the years that came from Africa; and, even without the terrible mortality, which Eusébio testified among the new arrivals, it can be said that almost all living Africans were criminally introduced into the country (NABUCO, 1977, p. 115-116, emphasis added).

In the words of lawyer Busch Varela (apud MORAES, 1966, p. 159-160), in a speech given on March 9, 1884, at a conference held in Rio de Janeiro:

As I have already noted, the 1831 Act does not contain a transitional provision; it did

> not limit itself to abolishing trafficking; went further--declared free all slaves, imported henceforth. Such a provision is, by its nature, irrevocable; freedom, once acquired, can never be lost. Those imported after 1831 acquired it, by express provision of law, they were never slaves in Brazil; they were victims of atrocious and condemned piracy; no one will say that theft is a means of acquiring property and legitimately transmitting it.
>
> The conclusion reached by Evaristo de Moraes is peremptory:
>
> One and only: many slaveholders, proud Brazilian landowners, if they were not thieves, were at least receivers of a large number of human freedoms; a good portion of their fortunes were rooted in the commission of the crime provided for in article 179 of the Criminal Code of the Empire, as it resulted from the direct enslavement of smuggled Africans and the indirect enslavement of free Africans, mixed in the farm with others (MORAES, 1966, p. 165).
>
> Now, if from 1831 onwards, any slave who, after the advent of this law, was imported and landed in Brazil would be considered a free man, then, it can be concluded that only slaves could be considered captives in Brazilian territory. children of slave mothers and fathers who had already arrived in the national territory, prior to this legislative diploma.

The process that led to the legal elimination of slavery on Brazilian soil was a long one. Almost fifty years before ``Lei Aurea (Golden law)`` (1888), the so-called Lei Feijó was enacted in November 1831, the first legislative movement to prohibit the importation of enslaved people into Brazil.

In addition to establishing fines for those who promoted the slave trade, the text guaranteed cash rewards to those who denounced the importers, and declared free all slaves who entered the country, with the exception of those who worked on foreign vessels or arrived as fugitives from countries where the slavery was allowed.

However, the Empire never showed interest in effectively ensuring compliance with the new legislation – approved much more as a kind of satisfaction to England, which pressured Brazil for the end of slavery, than because of an abolitionist conviction of the legislators.

After a brief reduction in imports, verified shortly after the law came into effect, the slave trade resumed its usual rhythm – and the current expression "para Inglês ver" is precisely due to the failure of the Feijó Law, a positive advance on paper, but which was never actually enforced.

Only almost twenty years later, with the Eusébio de Queirós Law (1850), the entry of African slaves became effectively prohibited in Brazil.

TRAJECTORY OF THE QUOTE LAW

We take as a starting point for this reflection the year 2001, when, at the Durban Conference, in South Africa, the Brazilian State recognized the effects of racism and the need to adopt measures that could minimize or mitigate the consequences of its effects.

Although the struggle for affirmative action policies (AAP) is old and black social movements have defended their implementation for a long time, it was after Durban that Brazil began to experiment with them more systematically.

In their origin, these policies came as quotas or reservation of vacancies in Higher Education Institutions (HEIs). This was voluntary in some HEIs and compulsory in others. We believe that Brazil's position in the South African Conference was decisive, as it started to support the old claim and also to demand more forcefully the adoption of such policies.

Since then, debates have intensified and some experiences have come true, until in 2012 the Quota Law was approved. This Law

established the obligation to reserve 50% of all vacancies in federal educational institutions for students from public schools, with a per capita income of less than one and a half minimum wages, and self-declared black, brown or indigenous (BRASIL, 2012).

CONCLUSION

We conclude our article by referring to the great lawyer Luiz Gama for having been knowledgeable of the legislation and his dream of a democratic society, fair for all and founded on the dignity of the person is present, as a lawyer through his work, he postulated in court several actions and made a great performance and defense of the black people.

We have evolved, but we must never forget our history, just as we cannot underestimate the distance we still have to travel.

In the new vision of law, justice and legislation, the law is no longer understood only from the parliamentary point of view to be caught as a result of projects and perspectives that build a minimally consensual text, whose ambiguity allows everyone in it to recognize each other.

This characteristic that allows legal texts to be the object of contradictory readings in the midst of legal and judicial disputes, new arenas of struggle in other forces are in conflict. For the period of Portuguese domination, however, the terrain still remains virtually unknown. There is, of course, an initial theoretical question that is almost never clearly formulated by those who dedicate themselves to the subject.

It deals with the nature of power and government in modern times, more specifically a power that was not conceived divided into legislative, executive and judiciary, but was unified, although hierarchical, and absolute, despite extending itself through a network of delegations. successive. For this reason, a reflection on the legislation in the Kingdom and, above all, in the Portuguese Empire must necessarily pass through this question.

The Brazilian slave system lasted violently for three and a half centuries. It took root, was long, ended late - in a conservative way - and became a language with very serious consequences.

On that May 13, 1888, the slavery of the black population did not formally end, without any socioeconomic integration, the newly freed population was thrown to the austere level of inequality and marginalization, becoming a slave of the previous structures of racial domination. Racism gained a new guise and the slave system became republican.

The black population was excluded from power relations, institutions and politics. Afro-descendant culture was erased, as were its few intellectuals who succeeded elsewhere. Abrupt social exclusion was faced, without any state compensation (education, health, work, housing).

The formal freedom of the black population effectively had its son: racism.

Equality is a fundamental right that is part of the essential content of a democracy.

About this, the words of historian Lilia Moritz Shwarcz are necessary and opportune: "The fight against racism and the promotion of racial equality are not themes that affect black populations so exclusively. We all lose when populist discourses call into question the beauty and the strength of diversity that is part of our own history. What is diminished is our democracy, as well as the pact built during the New Republic. In fact, as long as racism persists, we will not be able to speak of consolidated democracy.

Furthermore, black slaves were knowledgeable of imperial laws. In which they anchored themselves to defend the thesis that those born in the woods, far from the master's yoke, could legally justify their freedoms (FUNES, 1996, apud Castro).

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